BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

SEAN M. BUTERA Claimant VS.	)	
FLUOR DANIEL CONSTRUCTION Respondent AND	)	Docket No. 230,588
CNA INSURANCE COMPANY Insurance Carrier	)	

and

SEAN M. BUTERA Claimant VS.	)	
WOLF CREEK NUCLEAR OPERATING CORPORATION Self-Insured Respondent AND	)	Docket No. 231,584
FLUOR DANIEL CONSTRUCTION Respondent AND	)	
CNA INSURANCE COMPANY Insurance Carrier	)	

ORDER

Claimant and both respondents appeal the preliminary hearing Order of Administrative Law Judge Julie A. N. Sample dated June 10, 1998, wherein the Administrative Law Judge denied benefits for claimant against Fluor Daniel Construction and its insurance carrier finding that claimant had not proven accidental injury arising out of and in the course of his employment as claimant was on his way to assume the duties of employment and was precluded from obtaining benefits by the "going and coming rule."

The Administrative Law Judge went on to grant claimant benefits against Wolf Creek Nuclear Operating Corporation, a self-insured, finding claimant was a statutory employee of Wolf Creek.

ISSUES

Claimant, in his application to the Appeals Board, raises the following specific issues for consideration:

> "(1) Whether Fluor Daniel Corporation (sic) is responsible for providing compensation benefits for the injuries of Sean Butera as his direct employer because the circumstances of his accident of November 23, 1997 constitute an exception to the "coming and going" rule set out in K.S.A. 44-508(f), that being specifically that he was on the only available route to work, there was a special risk or hazard in the form of an unlit guardshack and concrete barriers in the middle of that route, and it was a route not used by the general public except in dealings with the statutory employer and its subcontractors?
>
> "(2) Whether the Legislature intended to create a specific class of persons who could not by definition come within the exception to the "coming and going" rule, that being employees of subcontractors who work at a jobsite of the principle where the subcontractors perform their work?"

Respondent, Wolf Creek Nuclear Operating Corporation, in its application to the Appeals Board, raises the following specific issues for consideration:

> "(1) The administrative law judge's failure to grant principal contractor, Wolf Creek Nuclear Operating Corp.'s motion to dismiss without prejudice in contravention of the mandatory language of K.S.A. 44-503(g) which requires that where the contractor (claimant's immediate and direct employer) is insured, the claimant shall have no right to file a claim against or otherwise proceed against the principal;
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> "(2) Arising in the course of employment;
>
> "(3) The administrative law judge's failure to grant principal contractor Wolf Creek Nuclear Operating Corp.'s request for an order of recovery back against the contractor, Fluor Daniel

> Construction, pursuant to K.S.A. 44-503(f) in the event of any award of compensation against Wolf Creek Nuclear Operating Corp."

Respondent, Fluor Daniel Construction, it its application to the Appeals Board, raises the following specific issues for consideration:

> "(1) Denial by Judge Sample of Fluor Daniel's oral motion to dismiss Wolf Creek under K.S.A. 44-503(g) made during the beginning of the Preliminary Hearing, as renewal of the written motion by Wolf Creek;
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> "(2) Whether Wolf Creek has any 'entitlement' as statutory employer to indemnification under K.S.A. 44-503(b) under the findings established by this Judge;
>
> "(3) Whether the claimant, barred from direct recovery from employer Fluor Daniel by the 'coming and going rule' and K.S.A. 44-508(f) may still recover indirectly from Fluor Daniel through the operation of K.S.A. 44-503; and
>
> "(4) Whether the motor vehicle accident of the claimant, on the way to work, arose 'out of the course of' his statutory employment with Wolf Creek Nuclear Operating Corporation."

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Claimant, an employee of Fluor Daniel Construction, was injured on November 23, 1997, when his motor vehicle struck a concrete barrier protecting a guard shack constructed by Wolf Creek on a county road known as Sharp Road. The guard shack was built and maintained by Wolf Creek on a county road used regularly by Wolf Creek employees to access the Wolf Creek Nuclear Power Plant. At the time, claimant was employed by Fluor Daniel, a contractor doing work for Wolf Creek at the Wolf Creek Nuclear Power Plant.

It is acknowledged by the parties that Wolf Creek is self-insured and is not the employer of the claimant. It is further acknowledged by the parties that Fluor Daniel is and was insured by CNA Insurance on the date of accident, and had a valid policy of insurance in effect for that time period.

The Administrative Law Judge found, as claimant was injured on a county road on his way to assume the duties for Fluor Daniel and was not yet on the clock, that the "going

and coming rule" precluded him from obtaining benefits from his employer, Fluor Daniel. The Administrative Law Judge went on to find, however, that claimant was a statutory employee of Wolf Creek and, as Wolf Creek controlled the location of the guard shack including the concrete barriers and as an exterior light at the guard shack which was Wolf Creek's responsibility to maintain was not functioning on the morning of the accident, it was Wolf Creek's negligence which led to the injury, thus negating the application of the "going and coming rule" against Wolf Creek.

Respondent, Wolf Creek, objects to the assessment of benefits against it, citing K.S.A. 1997 Supp. 44-503(g) which states in part:

> . . . the principal shall not be liable for any compensation under this or any other section of the workers compensation act for any person for which the contractor has secured the payment of compensation which the principal would otherwise be liable for under this section and such person shall have no right to file a claim against or otherwise proceed against the principal for compensation under this or any other section of the workers compensation act.

The Administrative Law Judge assessed liability against Wolf Creek after having first found that claimant was precluded from obtaining benefits from Fluor Daniel, his employer, by reason of the "going and coming rule." She went on to hold that the language of the statute where it states "payment of compensation is . . . otherwise unavailable . . ." exists in this circumstance as the "otherwise unavailable" applies in a broad sense to this unusual circumstance wherein the claimant is precluded from obtaining benefits because of the "going and coming rule" against a specific employer.

The Appeals Board, in reviewing the language of K.S.A. 1997 Supp. 44-503(g), disagrees with the Administrative Law Judge's analysis. The principal in this case, Wolf Creek, cannot be held liable where the contractor has secured payment of compensation for which the principal would otherwise be liable. In this instance, Fluor Daniel has obtained compensation insurance through CNA Insurance Company and its insurance policy, as stipulated, was in effect on the date of accident. K.S.A. 1997 Supp. 44-503(g) cannot negate the requirement under K.S.A. 1997 Supp. 44-501 that the employee suffer accidental injury arising out of and in the course of employment. Normally, accidents that happen while going to and coming from work do not constitute accidents arising out of and in the course of employment. Certain exceptions have been created to this "going and coming rule." First, if the injury occurs on the employer's premises, the "going and coming rule" no longer applies. Second, if a special hazard exists to which the employee is subject to as a result of the travel to and from work, the "going and coming rule" does not apply. Finally, if the approximate cause of the injury is the employer's negligence, then the "going and coming rule" would not apply.

In this instance, the guard shack was not on the premises of respondent, Fluor Daniel. Claimant was not on a specially hazardous route within the meaning of K.S.A. 1997 Supp. 44-508(f) and the route in question was not a route used by the public only in dealing with the employer as other employers, including Wolf Creek, used the route on a regular basis. In addition, Sharp Road was a county road used by farmers in the area, although it is understood that the majority of the traffic did deal with the Wolf Creek Nuclear Power Plant. This is a situation where claimant was simply going to work on a route available. This route was used by other individuals employed by other companies also proceeding to their own places of employment. In addition, respondent, Fluor Daniel, cannot be held liable for any negligence which may or may not have occurred as a result of the failure by Wolf Creek to light the security shack and the surrounding concrete barriers. The Appeals Board, therefore, finds that the claimant was in the process of coming to work and it cannot be found that his accidental injury arose out of and in the course of his employment with Fluor Daniel. Therefore, under K.S.A. 1997 Supp. 44-508(f) claimant cannot obtain benefits from Fluor Daniel and its insurance carrier for this accidental injury.

With regard to whether claimant is a statutory employee of respondent, Wolf Creek, the Appeals Board finds the language of K.S.A. 1997 Supp. 44-503(g) to be specific. The contractor, Fluor Daniel, has secured compensation for which the principal would otherwise be liable and, therefore, claimant has no right to file a claim against the principal in this instance. The language of K.S.A. 1997 Supp. 44-503(g) precludes an assessment of liability against Wolf Creek as the principal.

Claimant argues that the legislature intended to create a specific class of persons who do not by definition come within the exception to the "going and coming rule," that being employees of subcontractors who work at job sites of a principal. A review of the Workers Compensation Act fails to uncover any such specific intent by the legislature to create this special class of persons where subcontractors may work at different job sites designated by their contract with the principals. The Appeals Board, therefore, finds claimant's appeal on this issue should be dismissed.

WHEREFORE, it is the finding, decision, and order of the Appeals Board that the Order of Administrative Law Judge Julie A. N. Sample dated June 10, 1998, be reversed in part and affirmed in part in that claimant is denied an award against his employer, Fluor Daniel Construction, and its insurance carrier, CNA Insurance Company, for having failed to prove accidental injury arising out of and in the course of his employment and further is denied an award against Wolf Creek as his claim against Wolf Creek is precluded by K.S.A. 1997 Supp. 44-503(g).

IT IS SO ORDERED.

Dated this ____ day of September 1998.

BOARD MEMBER

c: George H. Pearson, Topeka, KS
Thomas D. Billam, Overland Park, KS
Kim R. Martens, Wichita, KS
Julie A. N. Sample, Administrative Law Judge
Philip S. Harness, Director